80-61

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No. _____

CLAUDE DEWAYNE FULTZ, - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No. _____

CLAUDE DEWAYNE FULTZ, - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

Comes now appellant and submits his Jurisdictional Statement and requests that this court note probable jurisdiction.

OPINION BELOW

The opinion of the Court of Appeals of Kentucky is officially reported at *Fultz* v. *Commonwealth,* Ky., 596 S.W.2d 28. The order of the Supreme Court of Kentucky refusing to review the opinion of the Court of Appeals has not yet been officially reported. A copy is contained in the appendix hereto.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 USC §1257(2), this being an appeal which draws into question of the validity of Kentucky Revised

Statute 533.060[1] on the grounds that it is repugnant to the Constitution of the United States.

Petitioner was convicted on a plea of guilty of robbery in the second degree in the circuit court of Jefferson County, Kentucky. Pursuant to this conviction he was sentenced to a term of 9 years in the state penitentiary. His motion for probation was denied by the trial court as being barred by operation of law under the provisions of *KRS* 533.060. In his motion for probation Petitioner challenged the validity of *KRS* 533.060 the mandatory non-probation statute, as being repugnant to the provisions of the United States Constitution.

The Circuit Court rejected Petitioner's contention and denied probation as barred by operation of *K.R.S.* 533.060. Petitioner appealed to the Court of Appeals of Kentucky from the judgment and order of sentencing of the Jefferson Circuit Court. On appeal, the issue of the constitutionality of *KRS* 533.060 was raised by Petitioner and said the validity of said statute, in relation to the United States Constitution was upheld by the Court of Appeals in its opinion rendered December 7, 1979, and reported at *Fultz* v. *Commonwealth,* Ky., 596 S.W.2d 28 (1979).

Petitioner filed a timely Petition for Discretionary Review by the Supreme Court of Kentucky. The Supreme Court of Kentucky denied discretionary review by its order of April 15, 1980, thereby making the decision of the Kentucky Court of Appeals the decision of the highest court in the state from which decision

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[1]Hereinafter cited as K.R.S.

could be had. Since the Court of Appeals of Kentucky has expressly rejected Petitioner's challenge to *K.R.S.* 533.060 on federal constitutional grounds, this matter is properly brought to this court by appeal. See *Judice* v. *Vail,* 430 U. S. 327 (1977).

Rule 12.02 of the Kentucky Rules of Criminal Procedure, and Rule 76.20 of the Kentucky Rules of Civil Procedure vest in the Kentucky Supreme Court the authority to decline to review the decision of the Kentucky Court of Appeals in an action appealed from circuit court. Therefore, the decision of the Court of Appeals of Kentucky is appealable to this court. See *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U. S. 157 (1954).

In the event that the court does not consider appeal the proper mode of review, the Petitioner requests that the papers whereupon his appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 USC §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and Statutory provisions involved are as follows:

KRS 533.060

(1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable

of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge.

(2) When a person has been convicted of a felony and is committed to a correctional facility maintained by the bureau of corrections and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, such person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

(3) When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which said person is awaiting trial. (Enact. Acts 1976, ch. 180, §2).

THE EIGHTH AMENDMENT

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

KRS 533.060 is found in Volume 16 of the official edition of the Kentucky Revised Statutes, at page 125 of the supplement.

QUESTION PRESENTED ON APPEAL

Whether Kentucky's Mandatory Non-Probation Sentencing Statute, *KRS* 533.030, Is Impermissibly Over-Inclusive and Violative of the Eighth Amendment of the United States Constitution?

STATEMENT OF THE CASE

The appellant, Claude Fultz, and two other men were indicted by the Jefferson Grand Jury and charged with violation of *KRS* 515.020, robbery in the first degree. T.R., p. 2. The appellant entered a plea of not guilty, and notified the Court and Commonwealth of Kentucky of his intent to rely upon a defense of insanity. T.R., pp. 7 and 26.

On October 16, 1978, the appellant changed his plea from not guilty to guilty on an amended charge of robbery in the second degree, *KRS* 515.060. T.R., pp. 65-70. Whereupon, the Commonwealth recommended to the Court a sentence of 9 years. T.R., p. 63.

At the request of counsel for the appellant, a pre-sentencing report was prepared and filed, and rendition of judgment was delayed until November 17, 1978. T.R., p. 62. At that time, appellant's motion for probation was overruled, the Court holding that probation could not be considered pursuant to the provisions of *KRS* 533.060. The Court entered judgment sentencing the appellant to nine years in the penitentiary. T.R., pp. 77 and 79.

The specific language of the indictment read as follows:

> "That on or about the 2nd day of October, 1977, in Jefferson County, Kentucky, all the above named defendants, Claude Dewayne Fultz, William Otis Robinson, and Patrick Joseph Sullivan, committed first degree robbery by threatening the use of physical force upon Wilbert Allmond, while armed with a pistol, and in the course of committing a theft at a MaJik Food Mart."

The two co-defendants were granted probation by the Court. T.R., pp. 100 and 102.

In his motion for probation Fultz challenged the constitutionality of *KRS* 533.060 as violative of the Eighth Amendment. In denying the motion the order of the trial court stated that probation was barred by operation of law, *KRS* 533.060. T.R., pp. 82-99 and 79.

Fultz appealed to the Court of Appeals of Kentucky asserting that the provisions of *KRS* 533.060 were unconstitutional in that they constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The Court of Appeals of Kentucky expressly rejected this contention and held that the statute did not violate the Eighth Amendment. Petition of discretionary review was filed before the Supreme Court of Kentucky, which declined to exercise its discretionary power to review the decision of the Court of Appeals.

HOW THE FEDERAL QUESTION WAS RAISED IN STATE COURT

The Federal constitutional question was squarely raised before the trial court in appellant's motion for probation, wherein he stated that *KRS* 533.060 was unconstitutional in that it violated the United States Constitution. The trial court nevertheless ruled that probation was barred by operation of law. T.R., p. 79. The order sentencing Fultz specifically recited the applicability of *KRS* 533.060. T.R., p. 77.

After specifically having the issue raised in appellant's brief the Court of Appeals rejected the Federal challenge by stating:

> "This appeal is predicated upon two theories. The first is that *KRS* 533.060 is unconstitutional, which contention is disposed of in *Parrish* v. *Commonwealth,* Ky., 581 S.W.2d 560, at 563 (1979).[2]

The issue was again raised in petition for review before the Kentucky Supreme Court, which review was denied without comment.

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[2]*Parrish* v. *Commonwealth* was decided by the Supreme Court of Kentucky on April 10, 1979, a few days after the filing of appellant's brief before the Court of Appeals.

THE FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL

This Court Can Put an End to Non-Probation Sentencing Statutes Which Are Impermissibly Over-Inclusive and Deny Probation to Ideal Candidates by Determining if *KRS* 533.060 Is Cruel and Unusual Punishment, Violative of the Eighth Amendment of the United States Constitution.

This action presents squarely the question of constitutionality of whether a sentencing statute which provides that where a felony is committed and one of the persons committing the felony has in his possession a gun he is not entitled to consideration for probation or conditional discharge as a matter of law is unconstitutional as cruel and unusual punishment. The petitioner herein is an ideal candidate for probation; however, the trial court denied probation, specifically citing that probation was barred as a matter of law.

Claude Fultz pled guilty to a charge of robbery in the second degree. He and two other men had robbed a foodstore at gun point. The other defendants also pled guilty and were sentenced to terms in prison which sentences were probated. Fultz was sentenced to 9 years in the state prison, and his motion for probation was denied upon grounds that he was the one who had actually held the gun, and that therefore probation was barred by *KRS* 533.060.

Claude Fultz is a young man who grew up a native of rural Rowan County, Kentucky. As the various letters submitted by members of his community, and appearing of record in the motion for probation, in-

cluding the Mayor, Sheriff, former Sheriff, and a state police detective indicate, he comes from a background of decent honest people, and had never himself been involved in trouble of any kind. At the time of the crime mentioned in the indictment, he was an enlistee in the United States Army stationed at Fort Knox, Kentucky. The deposition of his Sergeant, Willie L. Williams, was taken as evidence by the Commonwealth. Sergeant Williams described Fultz as a good worker, who would always do his share of the work. Dep., p. 12.

In preparation for a potential insanity defense, Fultz was examined by Dr. Glen M. Weaver, a psychiatrist in Cincinnati, Ohio, and Deleno Webb, a psychiatrist in Huntington, West Virginia. Pursuant to the Court's order he was examined by Dr. Pran Ravani, a psychiatrist at Louisville, Kentucky. The reports of all these gentlemen were filed with a motion for probation. T.R., pp. 82-99.

Dr. Weaver described Fultz as being easily lead by others. Certainly, given his background as an otherwise good and hard working young man, this sort of finding would strongly mitigate against placing him, at age 24, into confinement with other and more experienced criminals. Dr. Weaver further suggests that the appropriate course for Fultz would be to pursue psychiatric assistance.

Dr. Webb confirmed the findings of Dr. Weaver and indicated that Fultz had schizoid tendencies. His report in conjunction with the other evidence submitted, clearly indicates that Fultz is one deserving of very serious consideration for probation or shock probation.

Dr. Ravani clearly does not indicate anything in his report to contradict the other evidence that Fultz is, outside the present case, a peaceful and well mannered young man, and certainly a good candidate for rehabilitation outside of the penitentiary.

Even if one assumes that Fultz had a weapon as defined in the statute at the time of the committing of the crime, the record shows that he did not cause injury to anyone or even state an intention to do so. His, by all evidence of record, was a basically passive role.

This Court's long held position in Eighth Amendment questions has been to stress the need for a separate evaluation of the facts and circumstances of the particular offense, and the individual facets and characteristics of the particular defendant in arriving at a sentence. Such considerations are expressly excluded by the mandatory and arbitrary classification of *KRS* 533.060.

The Eighth Amendment to the *United States Constitution* reads:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The appropriate test for whether or not a given statutory punishment violates the Eighth Amendment as applied to the states through the Fourteenth Amendment is set forth in *Woodson* v. *North Carolina,* 428 U. S. 280, (1976). In that case, the measure was defined by the majority opinion as follows:

> "The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.' . . . Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg* v. *Georgia,* ante, at 176-182, 49 L. Ed. 2d 859, 96 S. Ct. 2909, indicia of societal values identified in prior opinions include history and traditional usage,[11] legislative enactments,[12] and jury determinations.[13]"

In *Gregg* v. *Georgia,* 428 U. S. 153 (1976) the Court stated:

> "We have long recognized that for the determination of sentences, justice generally requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender" [Numerous citations omitted] at pg. 189.

Similarly in *Williams* v. *New York,* omitted, 337 U. S. 241 the Court states:

> "The punishment should fit the offender and not merely the crime. [Citations omitted]. The belief no longer prevails that every offense in a like legal catagory calls for an identical punishment without regard to the past life and habits of a particular offender." at pg. 547.

The Supreme Court of Kentucky has previously rejected a challenge to the constitutionality of *KRS* 533.060 in *Parrish* v. *Commonwealth,* Ky., 581 S.W.2d 560 (1979).

Parrish upholds the mandatory non-probation statutes by analogy to a case in which a sentence of life without parole was upheld in *Green* v. *Commonwealth,* Ky., 556 S.W.2d 684 (1977). *Green* v. *Commonwealth* expressly misapplies the relevant tests. Unfortunately the Supreme Court of Kentucky completely failed to treat the central question raised by *KRS* 533.060, even though it was a pivotal consideration in *Moore* v. *Cowan,* 560 F.2d 1298 (6th Cir., 1977), a case upholding the life without parole provisions, specifically the requirement of individual evaluation of the particular crime and the particular circumstances.

In *Moore* v. *Cowan,* the Court considered the constitutionality of the sentencing provisions of *KRS* 435.090 which read in relevant part:

> "Any person who unlawfully carnally knows a female of and above twelve (12) years of age against her will or consent, or by force or while she is insensible shall be punished by death, or by confinement in the penitentiary for life without privilege or parole, or by confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years."

In discussion of the constitutionality of *KRS* 435.090 *vis a vis* the Eighth Amendment, the Court said:

> "As regards the claim that the penalty represents constitutionally impermissible cruel and unusual punishment, it is important to bear in mind that the statute did not require life without parole as a mandatory punishment for rape. That sentence was but one of the alternatives available to the

> jury. We must assume that the Kentucky juries considered the various alternatives before returning the sentences of life imprisonment without parole, and that their determinations were based on the facts before them in each case."

The fundamental misconception of the Kentucky Supreme Court in upholding *KRS* 533.060 is demonstrated by its citation of *Moore* v. *Cowan,* specifically, its belief that a challenge to a sentence on Eight Amendment grounds must turn on the degree of severity of the particular punishment rather than upon the manner of its determination, or a combination thereof.

Interestingly, the life without parole statute construed in *Moore* v. *Cowan* has since been repealed.

KRS 533.060 is directly contrary to this court's dictate that contemporary standards require examination of individual circumstances and characteristics in determination of a sentence. The statute is particularly arbitrary when it is considered that it applies only to guns, and only to the individual among a group acting in concert, who actually holds the gun. One who is convicted of holding a gun in his hand while a robbery is committed is denied consideration for probation even though no one is injured and no attempt to injure anyone is made, whereas one who robs a store and arbitrarily executes the store personnel with a knife in the process would be entitled to consideration for probation.

The denial of individual consideration to Claude Fultz on the basis of the arbitrary classifications of

KRS 533.060 constitutes cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons this court should note probable jurisdiction over the controversy presented herein.

Respectfully submitted,

CREECH, CONN & DILL
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Ashland, Kentucky 41101
Attorneys for Petitioner

APPENDIX

OPINION RENDERED: DECEMBER 7, 1979

COURT OF APPEALS OF KENTUCKY

File No. 79-CA-263-MR

CLAUDE DWAYNE FULTZ

v.

COMMONWEALTH OF KENTUCKY

Appeal From Jefferson Circuit Court
Action No. 160521

MANDATE

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It appearing that there is no error in the judgment of the Circuit Court, it is therefore the mandate of this Court that said judgment is hereby AFFIRMED.

APRIL 15, 1980—Movant's Motion for Discretionary Review by Supreme Court Denied.

A Copy - Attest:

(SEAL)

(s) John C. Scott, Clerk

Issued: April 16, 1980

OPINION RENDERED: DECEMBER 7, 1979
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 79-CA-263-MR

CLAUDE DWAYNE FULTZ - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Benjamin Shobe, Judge
Action No. 160521

AFFIRMING

BEFORE: GANT, HOWARD and WHITE, Judges.

GANT, JUDGE. Appellant, along with William Robinson and Patrick Sullivan, was indicted for armed robbery. The record discloses that both Robinson and Sullivan entered a plea of guilty to robbery in the second degree and that on hearing for probation the Commonwealth Attorney stated that both were eligible for probation under KRS 533.060, as they were not "the armed individual." Subsequently, appellant was permitted to plead to the same reduced charge and, in open court, admitted that he committed the robbery "while armed with a pistol." Probation was denied as prohibited under KRS 533.060.

This appeal is predicated on two theories. The first is that KRS 533.060 is unconstitutional, which contention is disposed of in *Parrish* v. *Commonwealth,* Ky., 581 S.W.2d 560, 563 (1979).

The second ground was that the Commonwealth failed to prove that the pistol was "a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury . . . ." We find this equally without merit. The Supreme Court of Kentucky, in interpreting the almost identical language contained in KRS 500.080(4)(a), the "deadly weapon" statute, has held that the intent of the legislature in these cases was not to change the law that the definition is satisfied if the weapon is intended by its user to convince a victim that it is deadly and the victim is in fact convinced. *See Kennedy* v. *Commonwealth,* Ky., 544 S. W. 2d 219, 221 (1977), and *Merritt* v. *Commonwealth,* Ky., 386 S. W. 2d 727 (1965).

Additionally, a plea of guilty obviates the necessity of proving the elements of the crime. *See McGrew* v. *Commonwealth,* 308 Ky. 838, 215 S. W. 2d 996 (1948), and *Waddle* v. *Commonwealth,* Ky., 391 S. W. 2d 687 (1965). His admission to the use of a gun in the commission of an armed robbery, in answer to a direct question by the court, is sufficient to bring his application for probation within the purview of the statute.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

Attorney for Appellant:

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SUPREME COURT OF KENTUCKY

80-SC-29-D
(79-CA-263-MR)

CLAUDE FULTZ - - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Jefferson Circuit Court
#160521

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Claude Fultz for a review of the decision of the Court of Appeals is denied.

Stephens, J., not sitting.

ENTERED April 15, 1980.

(s) John S. Palmore
Chief Justice

JEFFERSON CIRCUIT COURT

No. 16,0521

CLAUDE DEWAYNE FULTZ, - - *Appellant/Defendant,*

v.

COMMONWEALTH OF KENTUCKY, - *Appellee/Plaintiff.*

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT—Filed June 20, 1980

Comes now the defendant/appellant, Claude Fultz, by counsel, and gives notice this 19th day of June, 1980, that he does hereby appeal to the Supreme Court of the United States from the Judgment of the Court of Appeals of Kentucky, dated December 7, 1979, which judgment affirmed the judgment and order of sentencing of this Court.

The name of the appellee is the Commonwealth of Kentucky. This appeal is taken pursuant to 28 USC §1257(2).

Creech, Conn & Dill
By: (s) Gordon J. Dill, Jr.
Attorney for Appellant/Defendant
First Bank Building
Ashland, Kentucky 41101

PROOF OF SERVICE

The undersigned, Gordon J. Dill, Jr., counsel for the appellant, and a member of the Supreme Court, state that I have served true and correct copies of appellant's Notice of Appeal from the Court of Appeals of Kentucky to the Supreme Court of the United States by mailing true and correct copies thereof to Hon. Stephen Beshear, Attorney General of Kentucky, Frankfort, Kentucky, first class postage pre-paid on the 30th day of June, 1980.

(s) Gordon J. Dill, Jr.
Creech, Conn & Dill
1107 First Bank Building
Ashland, Kentucky 41101

STATE OF KENTUCKY
COUNTY OF BOYD

Subscribed and sworn to before me by Gordon J. Dill, Jr., this the 30th day of June, 1980.

My commission expires: October 19, 1982

(s) Linda Fannin
Notary Public, Kentucky State At Large

COURT OF APPEALS OF KENTUCKY

No. 79-CA-263-MR

CLAUDE DEWAYNE FULTZ, - - *Appellant/Defendant,*

v.

COMMONWEALTH OF KENTUCKY, - *Appellee/Plaintiff.*

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT—Filed June 20, 1980

Comes now the defendant-appellant, Claude Fultz, by counsel, and gives notice this 19th day of June, 1980, that he does hereby appeal to the Supreme Court of the United States from the Judgment of the Court of Appeals of Kentucky, dated December 7, 1979, which judgment affirmed the judgment and order of sentencing of this Court.

The name of the appellee is the Commonwealth of Kentucky. This appeal is taken pursuant to 28 USC §1257(2).

Creech, Conn & Dill
By: (s) Gordon J. Dill, Jr.
Attorney for Appellant/Defendant
First Bank Building
Ashland, Kentucky 41101

PROOF OF SERVICE

The undersigned, Gordon J. Dill, Jr., counsel for the appellant, and a member of the Supreme Court, state that I have served true and correct copies of appellant's Notice of Appeal from the Court of Appeals of Kentucky to the Supreme Court of the United States by mailing true and correct copies thereof to Hon. Stephen Beshear, Attorney General of Kentucky, Frankfort, Kentucky, first class postage pre-paid on the 30th day of June, 1980.

(s) Gordon J. Dill, Jr.
Creech, Conn & Dill
1107 First Bank Building
Ashland, Kentucky 41101

STATE OF KENTUCKY
COUNTY OF BOYD

Subscribed and sworn to before me by Gordon J. Dill, Jr., this the 30th day of June, 1980.

My commission expires: October 19, 1982

(s) Linda Fannin
Notary Public, Kentucky State At Large

80-61

Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No. _____

CLAUDE DEWAYNE FULTZ - - - Appellant

versus

COMMONWEALTH OF KENTUCKY - - Appellee

MOTION TO DISMISS APPELLANT'S APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No. _____

CLAUDE DEWAYNE FULTZ - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OF APPELLEE

Comes now the appellee, Commonwealth of Kentucky, and in response to the Jurisdictional Statement of the appellant, Claude Dewayne Fultz, moves this honorable Court to dismiss this present appeal to this Court from the judgment of the Court of Appeals of Kentucky pursuant to Rule 16.1(b) of the Rules of the United States Supreme Court as the appeal does not present a substantial federal question.

OPINION BELOW

Substantially the same issue as is presently before this Court was presented by the appellant in his direct appeal of his judgment of conviction to the Court of

Appeals of Kentucky, whose opinion affirmed the appellant's conviction. A copy of said opinion is included in the appellant's Appendix.

JURISDICTION

The appellant has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether a Mandatory Statutory Provision Prohibiting Probation, Shock Probation, or Conditional Discharge for One Convicted of the Commission of a Felony With the Use of a Firearm Constitutes Cruel and Unusual Punishment Within the Meaning of the Eighth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant's appeal herein was filed pursuant to 28 U.S.C. § 1257(2) and he claims relief under the Eighth and Fourteenth Amendments to the United States Constitution. The appellant has challenged the constitutionality of Kentucky Revised Statute (KRS) 533.060.

STATEMENT OF THE CASE

The appellant, Claude Dewayne Fultz, was indicted by the Jefferson County Grand Jury on November 29, 1977, for the offense of first-degree robbery; the indictment further charged that the appellant committed

said offense "by threatening the use of physical force upon Wilbert Allmond, while armed with a pistol" on October 2, 1977. (Transcript of Record, hereinafter T.R., p. 62.) While the appellant initially entered a plea of not guilty, he subsequently withdrew that plea and entered a plea of guilty to the offense of second-degree robbery. (T.R., p. 62.) The appellant was indicted along with two other individuals for the robbery.

The trial court held, and the Commonwealth so argued, that the two co-indictees were *not* the armed party in the commission of the offense. (T.R., pp. 52, 64, 74.) As such, the trial court did not apply the requirements of KRS 553.060(1) to these individuals.

In the Commonwealth's recommendation on the appellant's plea of guilty, the Commonwealth stated that the appellant, and two others in a car, robbed the "Majik Mart" store at gunpoint. On October 16, 1978, the trial court held a hearing on appellant's plea of guilty. (T.R., pp. 65-69.) The trial court thoroughly questioned the appellant as to whether he understood the nature of his guilty plea, and his right to a jury trial. (T.R., pp. 65-66.) The trial court specifically asked the appellant:

> Q. The indictment says that on the 2nd day of October, 1977 that you along with William Otis Robinson and Patrick Sullivan robbed one Wilbert Allmond (sic) while armed with a pistol at the Majik Food Mart; is that what you did, sir?
>
> A. Yes, sir. (T.R., p. 69.)

On November 17, 1978, Judge Benjamin Shobe entered an order denying probation with the notation, "Probation is prohibited by law." (T.R., p. 79.)

REASON FOR DISMISSING THE APPEAL

The Appellant Has Failed to Present a Substantial Federal Question.

In this appeal, the appellant, Claude Dewayne Fultz, has raised the contention that KRS 533.060(1) is unconstitutional as it violates the Eighth Amendment's prohibition against cruel and unusual punishment. This statute provides that when, as is the fact in the present case, a person is found guilty or pleads guilty of a Class A, B, or C felony committed with the use of a firearm, that person shall be denied probation, shock probation, or conditional discharge as a matter of law. Appellant has set out the text of this statute in full at pages 3 and 4 of his Jurisdictional Statement.

In support of his contention, the appellant argues that he was an excellent candidate for probation as he is generally a good fellow. The appellee submits to this Court that such an argument hardly raises a substantial federal question for review by this Court. The record on direct appeal to the Court of Appeals of Kentucky clearly supported the imposition of the nonprobationary restrictions of KRS 553.060(1). In the Commonwealth's recommendation to the appellant's guilty plea, the Commonwealth asserted that the appellant alone was armed during the robbery. (T.R., p. 63.) The appellant did not contradict this assertion

by any objection. During the hearing, the trial court specifically asked the appellant whether the indictment was true in that he robbed the Majik Mart while armed with a pistol. In response, the appellant answered, "Yes, sir." (T.R., p. 69.) Neither the appellant nor his counsel voiced any objection to this admission; no attempt was made to tell the trial court that the appellant was not the armed party. As such, this Court should totally disregard the argument made by the appellant as it fails to address the jurisdictional requirements of raising a substantial federal question.

The appellant further argues that the Eighth Amendment's prohibition against cruel and unusual punishment requires a sentencing court to evaluate not only the crime, but also the criminal. In support of this argument, the appellant contends that he is "a peaceful and well mannered young man" and that the record on appeal shows that in committing armed robbery he was without any intention to harm anyone and even had a passive role. As authority, the appellant cites *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), and *Gregg* v. *Georgia,* 428 U. S. 153 (1976). These cases merely discuss, in general terms, the proposition that the Eighth Amendment requires punishment to fit both the crime and the criminal.

The appellee submits that in the present case, the requirements as set out in *Woodson, supra,* and *Gregg, supra,* were fully met. The nature of the crime was the commission of a class felony with a firearm; the record, including the testimony of the appellant, before the trial court at the time of sentencing, was

that the appellant was possessed of the requisite criminal intent, including the intent to use the force of arms, in the commission of robbery. The legislature of Kentucky, in enacting KRS 533.060(1), has determined that persons using firearms and thereby threatening death or serious physical injury to the public are deserving of greater punishment. As such, the record before this Court reveals that the punishment in this case not only fits the crime, but it also fits the criminal.

The appellee wishes to point out to this Court that while the appellant has cited vague generalities concerning the Eighth Amendment, he has failed to cite to this Court *any* authority in direct support of his contention. Undoubtedly, this is because appellant's present contention has been rejected before. The validity of such non-probationary sentencing statutes has been recognized by not only the high court of Kentucky, but also by this Court. In *Moore* v. *Cowan,* 560 F. 2d 1298 (6th Cir. 1977), the Sixth Circuit Court of Appeals dealt with a challenge to KRS 435.090 which provided a mandatory life sentence without parole for the offense of rape. There, the Court held that such a statutory sentencing provision did not constitute cruel and unusual punishment.

In *Schick* v. *Reed,* 419 U. S. 256 (1974), this Court upheld such non-probationary/no parole sentencing against attack based upon the Eighth Amendment. Specifically, this Court stated at page 267:

> The no-parole condition attached to the commutation of his death sentence is similar to sanctions

> imposed by legislatures such as mandatory minimum sentences on statutes otherwise precluding parole; it does not offend the Constitution.

In Kentucky, such mandatory, non-probation sentencing has been upheld. It has been held that a sentence of life imprisonment without parole is not invalid as cruel and unusual punishment. *Edwards* v. *Commonwealth,* Ky., 500 S. W. 2d 396 (1976); *Martin* v. *Commonwealth,* Ky., 493 S. W. 2d 714 (1973).

The statute in question was specifically approved by the Supreme Court of Kentucky in *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (1979), in which the Kentucky high court stated at page 563:

> We are of the opinion that the mandatory provisions of KRS 533.060 do not inflict cruel and unusual punishment, nor do these provisions deny Parrish equal protection of the law.
>
> . . .
>
> We are of the further opinion that the General Assembly by imposing the restriction of no probation for an offense involving a firearm, as here, makes a reasonable classification of weapons used in the commission of crimes . . . the General Assembly has expressed a public policy in the terms of KRS 533.060 which does not violate either the Constitution of the United States or the Constitution of Kentucky.

The appellee submits that the statute in question is constitutional as it does not constitute cruel and unusual punishment.

In addition, as this and other courts have rejected the contention of the appellant herein, the appellee submits that the appellant has failed to raise a substantial question of federal law.

CONCLUSION

The appellee submits that the appellant's appeal should be dismissed as it fails to meet the jurisdictional requirements of 28 U.S.C. § 1257(2) and Rule 16.1(b) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, George Geoghegan, Jr., member of the Bar of the Supreme Court, and counsel for the appellee, states that a true and correct copy of the aforegoing Motion to Dismiss was served upon the appellant by depositing three (3) copies of same in the United States Mails, first class postage prepaid, on this the 14 day of August, 1980, addressed to Hon. Gordon J. Dill, Jr., 1107 First Bank Building, Ashland, Kentucky 41101, Counsel for Appellant.

George Geoghegan Jr.

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